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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

No._____

JOHN HENRY BUTERA, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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JOHN HENRY BUTERA

November 24, 1983

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JOHN HENRY BUTERA

November 24, 1983

QUESTION PRESENTED

1. Whether state law or federal law determines the admissibility in federal court of electronic surveillance evidence gathered by a state police officer.

PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed are as follows:

JOHN H. BUTERA
ROBERT A. DeNOMA
UNITED STATES JUSTICE DEPARTMENT

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The Petitioner, JOHN HENRY BUTERA, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this case on June

10, 1982.

OPINION BELOW

The opinion of the Court of Appeals, reported at 677 F.2d 1376 (11th Cir. 1982), appears in the appendix hereto. No opinion was rendered by the District Court for the Middle District of Florida.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on June 10, 1982. A timely petition for rehearing was denied on September 27, 1982, and this Petition for Certiorari was filed within sixty (60) days of that date as required by Rule 20 of the Revised Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF CASE

The instant petition arises from JOHN H. BUTERA's convictions for distribution and

aiding and abetting in the distribution of cocaine in violation of 21 U.S.C. §941(a)(1) (1976) and 18 U.S.C. §2 (1976). This case was the result of a joint state/federal investigation in Orlando, Florida. The principal investigating agent was Michael Morris, a member of the Orlando Police Department coordinating with a United States Drug Enforcement Administration task force.

At BUTERA's trial, the Government introduced three incriminating tape recordings of a conversation involving BUTERA, a co-defendant, and Agent Morris, which had occurred in BUTERA's residence while the three men were planning a cocaine deal. The conversation was recorded by means of a "body-bug" worn by Agent Morris. No warrant was applied for or issued to authorize such electronic surveillance, as is required by Florida law.

At his trial in the Middle District of

Florida, and again on appeal to the Eleventh Circuit, BUTERA claimed that it had been error to admit into evidence the surveillance recordings made of Agent Morris' body-bug transmissions. These recordings clearly would be inadmissible under Florida law, and according to Second Circuit precedent, state law controls the admissibility in federal court of electronic surveillance evidence gathered by a state agent. United States v. Manfredi, 488 F.2d 588 (2d Cir. 1973). Both the trial court and the Eleventh Circuit, however, rejected BUTERA's contention, relying on the former Fifth Circuit precedent of United States v. Nelligan, 573 F.2d 251 (5th Cir. 1978). According to Nelligan, only federal law is relevant to determine the admissibility of evidence in federal court.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to the Applicability of State Law to Determine the Admissibility in Federal Court of Electronic Surveillance Evidence Gathered by State Agents.

The Eleventh Circuit ruling that the admissibility of electronic surveillance recordings in a federal prosecution is governed exclusively by federal law breaks with Second Circuit precedent. Beginning with United States v. Manfredi, 488 F.2d 588 (2d Cir. 1973), the Second Circuit consistently has looked to state law to determine the admissibility in federal court of electronic surveillance evidence gathered by a state agent. The Eleventh Circuit, following the former Fifth Circuit precedent of United States v. Nelligan, 573 F.2d 251 (5th Cir. 1978), has rejected the notion of applying state law to determine the admissibility of evidence in a feder-

al criminal proceeding. Though the Eleventh Circuit, following the former Fifth Circuit's cue, attempts to distinguish the Second Circuit's Manfredi line of cases, it is clear that the law of the Second Circuit is irreconcilable with that of the Fifth and (now) Eleventh Circuit.

In Manfredi, supra, the Second Circuit held that the facial validity of an electronic eavesdropping warrant issued to a state agent must be "determined by reference to state law." Id. at 598. Not limiting the applicability of state law to matters concerning the form of state warrants, Manfredi also held that state "minimization" standards determine the admissibility in federal court of electronic eavesdropping procedures used by state agents. The Manfredi doctrine was followed in United States v. Rizzo, 491 F.2d 215 (2d Cir.), cert. denied, 417 U.S. 944 (1974),

where the Second Circuit reiterated that the admissibility in federal court of electronic surveillance evidence gathered by state agents is determined by state law.

In United States v. Marion, 535 F.2d 697 (2d Cir. 1976), the Second Circuit limited the Manfredi doctrine to instances where state law imposed "more exacting" standards than "those of the federal statute." Id. at 702. According to Marion, federal law provides minimum standards for the interception of communications subject to "more exacting" state procedures applicable to state agents. Federal courts, however, are not always bound to apply more stringent state statutory standards for the admissibility of intercepted communications. As the Second Circuit ruled in United States v. Sotomayor, 592 F.2d 1219 (2d Cir. 1979), a federal court must "apply only those more stringent state statutory

requirements or standards that are designed to protect an individual's right to privacy, as distinguished from procedural rules that are essentially evidentiary in character." Id. at 1225.

The Eleventh Circuit in this case refused to apply Second Circuit precedent and adopted the former Fifth Circuit rule that only federal law controls the admissibility of evidence in a federal court. The law of the Eleventh Circuit is now in direct conflict with Second Circuit law. Had Second Circuit law been applied to this case, the recordings made of Agent Morris' body-bug transmissions would have been inadmissible due to the agent's failure to obtain a warrant as re-

quired by Florida law.[1] Under the precedent followed by the Eleventh Circuit, however, the recordings in question are admissible because federal law imposes no warrant requirement where one of the parties to a communication consents to the surveillance.

II. The Decision Below Raises Significant and Recurring Problems Concerning the Admissibility in Federal Court of Evidence Seized in Violation of State Law.

In the contemporary age of joint state/federal investigations, it is crucial for this Court to articulate the precise role of state law in determining the admissibility of electronic surveillance recordings in fed-

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[1] The Florida Constitution clearly requires a warrant for a state agent to intercept communications occurring in an individual's home, even if one of the participants to the communication consents to the surveillance. State v. Sarmiento, 397 So.2d 643 (Fla. 1981) (interpreting Article I, Section 12 of the Florida Constitution).

eral court. In Oregon v. Hass, 420 U.S. 714 (1975), this Court held that states were free to impose greater restrictions on police activity than those necessary under federal constitutional standards. If the Hass principle is to remain viable, some mechanism for excluding from federal court evidence seized in violation of state law must be implemented. The case law of the Second Circuit suggests an excellent mechanism for enforcing state restrictions on police surveillance and preventing a recurrence of the "silver platter" doctrine and law enforcement forum shopping.

The precedent of the former Fifth Circuit, adopted by the Eleventh Circuit in the opinion below, eviscerates the protection of state law by providing a federal forum which admits evidence seized in violation of state law. Though, under Hass, a state is free to provide a greater degree of protection from

governmental intrusion than does the federal constitution, the opinion below suggests a ready mechanism for circumventing state protection. State agents who gather evidence in violation of an individual's rights under the state constitution may simply turn the evidence over to federal authorities for federal prosecution.

Admittedly, few actual situations will track the above scenario. Most federal criminal cases involving issues of state law have arisen from joint investigations by state and federal agents. In such instances, neither the federal nor state prosecuting authorities are normally committed to prosecuting the investigations' targets prior to the conclusion of the investigations. The opinion below clearly would allow wholesale forum shopping by prosecuting authorities in such situations. Federal courts, however, should not be allowed

to become the forums of last resort to salvage the sloppy and illegal surveillance tactics of state agents.

Underlying the Eleventh Circuit's ruling is the concern that federal prosecutions might be hampered by unduly restrictive state laws. The Second Circuit precedent, however, refers a federal court to state law only when surveillance evidence is gathered by state agents. This precedent leaves the federal government free to pursue its own investigations with federal agents bound only by federal law. When the federal government, for whatever reason, attempts to further an investigation by using state agents, it is unreasonable to maintain that these state agents, by virtue of temporary association with federal agents, should be freed from the restric-

tions imposed upon their tactics by state law.[2] The more reasoned approach, as the Second Circuit has noted, is to put federal investigative bodies on notice that state agents and the fruits of their investigations are bound by state law.

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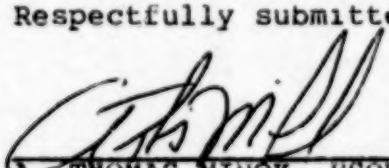
[2] The Eleventh Circuit in the opinion below noted that Agent Morris, though a member of the Orlando Police Department, had been "deputized" and received "part" of his pay from the federal government. These sketchy facts, however, are insufficient to make Agent Morris' investigation an exclusively federal investigation. Specifically, the following questions should be answered: (1) What percentage of Agent Morris' compensation was paid by federal authorities? (2) Had the federal prosecuting authority agreed to prosecute BUTERA prior to the illegal surveillance conducted by Agent Morris? (3) Were other state agents involved? (4) Were state resources involved? (5) Did forum shopping play a role in the decision to initiate a federal prosecution? (6) Why did the federal Government decide to use a state agent in this investigation? The answers to these questions currently are unknown because under the former Fifth Circuit precedent followed by the trial court, the answers were irrelevant.

C O N C L U S I O N

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

By: 

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